MAEDA CONSTRUCTION CO. LTD.

v.

BUILDING DESIGN TEAM & ORS.

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 310 OF 1985]
26 APRIL 1991

ARBITRATION: *Award - Whether arbitration proceedings completed - Valid award - Power and duty of arbitrator - Functus officio - Issue of costs - Whether awarded by arbitrator - Taxing - Interest on award - Arbitration Act 1952, ss. 17, 19(2) - Rules of the High Court 1980, O. 59 r. 12(b).*

The suit instituted by the plaintiff M against the defendants was settled by way of consent order dated 6 March 1986 (the said order) whereby the 2nd and 3rd defendants, D2 and D3 agreed to pay M a certain sum (the said sum) in full and final settlement of M's claim; as there were pending arbitration proceedings, between M and D2, it was part of the consent order that out of the said sum, a certain sum be retained (the retention sum) and held in a fixed deposit account with a bank under the joint names of M's solicitors. The balance of the said sum was paid to M.

On 28 January 1991, M sought an order for the release of this retention sum on the ground that the arbitration process had been completed as the arbitrator, C, had given an award on 13 October 1988 (the said award). C had made certain orders as to costs in favour of D2. It was contended by D2 that the arbitration process had not been completed as M had not paid to it the sum awarded by C and secondly that M was further arbitrating D2's claim for costs.

Held:

[1] D2's application to the High Court for remission of the said award to C for reconsideration was rejected - therefore the said award was final under s. 17 of the Arbitration Act 1952 (the Act).

[2] When an arbitrator makes a valid award, his authority as an arbitrator comes to an end and with it his powers and duties in the arbitration; he is therefore *functus officio* and there is no question of referring any issue back to the arbitrator unless both parties to the arbitration consent. In this case, there was no evidence of any such consent.

[3] The issue of costs of the arbitration should be dealt with by the Registrar of the High Court by virtue of s. 19(2) of the Act read together with O. 59 r. 12(b) of the Rules of the High Court 1980 (RHC).

[4] The evidence shows that C did not make a specified award of costs as alleged by D2; in addition, since C did not tax the amount of costs of the arbitration, such costs should be taxed in the High Court as provided under the Act and the RHC. Costs of arbitration should be left to the Registrar to tax on D2's application.

[5] The money in the joint account was kept in the bank as security to ensure that any arbitration award in favour of D2 would be paid by M; for all intents and purposes, it is M's money and whatever interest that C may order in favour of D2 will be deducted from the joint account.

[6] On the evidence, M had taken the necessary steps to effect payment of the interest on the award to D2 but was prevented by D2 from withdrawing the money from the retention sum. As such, D2 has forfeited or waived its rights to the interest on the award, notwithstanding the fact that the question of payment of interest did not arise as M had not breached the order under the award.

[7] D2 is not entitled to claim legal fees as C had not ordered for costs to be paid on solicitor client basis; there is also no provision in the arbitration agreement for costs to be on a solicitor client basis.

[8] The retention sum was ordered to be released to M, except for a sum of RM100,000 which was to be retained for the purposes of securing the payment of costs to be taxed by the Registrar for the arbitration proceedings.

[Order accordingly.]

Case referred to:
Inland Revenue Commissioners v. Hunter [1914] 3 KB 428

Legislation referred to:
Arbitration Act 1952, ss. 17, 19(2), 23(1)
Companies Act 1965, s. 351
Rules of the High Court 1980, O. 59 r. 12(b)

Other sources referred to:
Commercial Arbitration of Mustill and Boyd, pp. 356-357
Halsbury's Laws of England Vol. 2, para. 608

For the plaintiff - J.C. Fong; M/s. Reddi & Co.
For the defendant - Benedict Lim; M/s. Thong, Lim, Wong & Co.

JUDGMENT

Haidar Mohd. Noor J:

This suit is filed by the plaintiff, Maeda Construction Co. Ltd., for works carried out as a sub-contractor in respect of a 12 storey building known as Bangunan Satok, situated between Jalan Satok/Jalan Kulas in Kuching. This suit was settled on 6 March 1986 (see the consent Court order at encl. 56).

Under para. (2) of the consent Court order, the 2nd and 3rd defendants agreed to pay the plaintiff a sum of RM1,878,002.95 **in full and final settlement of the plaintiff's claim**. However, since there are pending arbitration proceedings between the plaintiff and the 2nd defendant, it was agreed as per para. (3) of the said consent Court order that a sum of RM1,026,887.30 out of the said sum of RM1,878,002.95 be retained and held in a fixed deposit account with a licenced bank in Malaysia under the joint names of the solicitors of the plaintiff and the 2nd defendant and that only the balance of the said sum amounting to RM852,115.65 be paid to the plaintiff. It would appear that the parties agreed to the sum of RM1,026,887.30 to be held in a joint account pending the outcome of the arbitration proceedings because the 2nd defendant wanted the plaintiff (being a foreign company) to provide security to meet the arbitration award.

The plaintiff filed a summons-in-chambers (encl. 58) on 28 January 1991 seeking an order of the Court for the release of the money held in the joint account of J.C. Fong and Benedict Lim in the Hongkong and Shanghai Banking Corporation on the ground that the arbitration process had been completed.

According to the plaintiff, the arbitration process had been completed as the arbitrator, Mr. W.Y. Chin, gave his award on 13 October 1988 (see Exhibit B1 to the affidavit filed at encl. 58). The award reads:

1. The respondents (plaintiff) shall pay to the claimant (2nd defendant) the sum of RM390,117.30 within 21 days from the date of the receipt of the award, **failing which,** an interest at 8% per annum shall be added thereon until the actual date of receipt of the said payment by the claimant.

2. The counterclaim of the respondent brought against the claimant is dismissed hereof; and

3. The respondent and the claimant shall bear and pay in the *ratio* of 4:1 respectively, the cost of:

   (a) this award, the arbitrator's fees, disbursement and Pam's charges amounting to RM49,857.48 and

   (b) the costs of this arbitration.

The 2nd defendant, however, opposed the application alleging that the arbitration process has not completed yet and that the plaintiff had initiated and taken steps to further arbitrate the 2nd defendant's claim for costs. It is further alleged that the plaintiff failed to pay the sum awarded by the arbitrator to the 2nd defendant and claims the right to get interest as ordered by the arbitrator in the event of such default and also interests accrued (and accruing) in the joint account. The application is supported by the affidavit of J.C. Fong. The 2nd defendant filed two affidavits in opposition through Benedict Lim.

It would appear to me that the objections of the 2nd defendant to the application of the plaintiff (encl. 58) are based on two grounds, namely:

(i) the arbitration proceedings is not over and there is a fresh/forthcoming arbitration.

(ii) there is allegedly a sum of RM1,046,240.66 due to the 2nd defendant arising out of the arbitration proceedings and the fresh/forthcoming arbitration.

(i) The arbitration proceedings is not over and there is a fresh/forthcoming arbitration

The plaintiff contended that the arbitration proceedings are over and referred to the arbitration award exhibited as B1 to the affidavit of J.C. Fong (encl. 58) to which I have set out in full earlier on. In fact the 2nd defendant had applied to the High Court under s. 23(1) of the Arbitration Act 1952 for the remission of the said award to the Arbitrator for reconsideration. However, on 17 October 1990 Tan Chiaw Thong J, dismissed the 2nd defendant's application with costs (see Exhibit 'C' to encl. 58). In that event it would clearly appear that the award of the arbitrator is final (see s. 17 of the Arbitration Act 1952). The question of referring any issue back to the arbitrator does not arise here as when an arbitrator makes a valid award his authority as an arbitrator comes to an end and with it his powers and duties in the arbitration and he is then *functus officio* (see pp. 356-357 of Commercial Arbitration of Mustill and Boyd). There is therefore no question of referring any issue back to the arbitrator unless with the consent of both parties to the arbitration (see *Inland Revenue Commissioners v. Hunter* [1914] 3 KB at 428). The arbitrator himself considered that he had no further jurisdiction on the matter when responding to the plaintiff's Counsel's letter of 12 January 1991 pertaining to the dismissal of the 2nd defendant's Originating Motion No. KG19 of 1988 (see Exhibits 'BL7' and 'F') when he said:

As I have no further jurisdiction as arbitrator for the reference, **I can only respond to specific issues by consent of both the parties or by order of the Court.** (emphasis added)

No doubt, Mr. Benedict Lim, counsel for the 2nd defendant, submitted that the plaintiff by the unqualified letter (Exhibit 'BL7') would appear to have initiated and taken the steps to further arbitrate the 2nd defendant's claim for costs there is nothing on record to show that the 2nd defendant agreed to such step taken by the plaintiff and in any event in view of the stand taken by the plaintiff by paras. 18(i) and (ii) of the affidavit in reply (see encl. 62) there is no prospect of any further arbitration by consent. In the circumstances the issue of costs of the arbitration should be dealt with by the Registrar of the High Court by virtue of s. 19(2) of the Arbitration Act 1952 read with O. 59 r. 12(b) of the Rules of the High Court 1980 (RHC). In my view, the submission of Mr. Benedict Lim that the issue of miscellaneous costs and legal fees payable to the 2nd defendant be reverted to the same arbitrator for his decision in a **fresh/forthcoming arbitration** has no merit whatsoever.

(ii) There is allegedly a sum of RM1,046,240.66 due to the 2nd defendant arising out of the arbitration proceedings and the fresh/forthcoming arbitration.

Mr. J.C. Fong submitted that the 2nd defendant has made the following claims which are extraneous to the arbitration award from the funds in the joint account:

(a) Miscellaneous costs	RM225,000.00
(b) Costs of Respondent	RM112,500.00
(c) Interest accruing on the joint account	RM 77,341.20
(d) Interest from 29 October 1988 to 28 February 1991	RM139,475.77
(e) Claimants' alleged legal fees	RM 83,400.00
	RM637,716.97

Mr. J.C. Fong submitted that the sums awarded by the arbitrator to the 2nd defendant on 13 October 1988 are:

(a) the principal amount of the award of RM390,117.30 and

(b) a further sum of RM18,406.39 being reimbursement by the plaintiff to the 2nd defendant of arbitrator's fees and expenses of the arbitration which the plaintiff has to pay to the 2nd defendant under the terms of the award.

Therefore, according to Mr. J.C. Fong, the total sums due to the 2nd defendant, apart from the claim for costs yet to be taxed by the Registrar, would be RM408,523.69. This is the sum that the plaintiff has asked to be paid out to the 2nd defendant in its summons in chambers (encl. 58).

I will now deal with the purported claims of the 2nd defendant as disclosed in the affidavits in opposition filed therein.

(a) *Miscellaneous costs of RM225,000*

The arbitrator did not award this amount though it is pleaded by the 2nd defendant in its amended statement of claim (see Exhibit BL1 in encl. 60). At most the arbitrator in his appraisal (Exhibit 'B2' to encl. 58) observed that this claim had to be further substantiated and that the further and better particulars under this head were insufficiently detailed for assessment. In other words he could not therefore make an assessment of the costs claimed and was providing basis for subsequent taxation rather taxing the costs himself and thereby just

awarded "costs of arbitration". According to *Halsbury's Laws of England*, Vol. 2 at para. 608, "costs of arbitration" include the costs of the preparation of the submission, and of the proceedings before the arbitrator and the award besides the costs of the argument of a special case stated for the decision of the Court pending the reference. In the circumstances the miscellaneous costs would have to be taxed by the Registrar as provided under O. 59 r. 12(b) of RHC. However it is to be noted that the arbitration agreement may direct the arbitrator to fix the costs, in which case he must do so and cannot direct that they may be taxed in Court but there would appear to be no evidence of such a provision. An award of costs simpliciter is valid, although the amount of the costs is not fixed and is taxed between party and party. Since the arbitrator did not tax the amount of the costs of the arbitration in this case, such costs should be left to be taxed in the High Court as provided under the Arbitration Act 1952 and the RHC. In my view costs of arbitration should be left to the Registrar to tax on the application of the 2nd defendant.

(b) *Costs of respondent (plaintiff)*

I do not know how this figure came about and it does not seem to be clear. In any event this sum was never awarded and would appear not to be within the contemplation of the award. I find no basis for this claim and in my view, it should be rejected accordingly.

(c) *Interest on joint account*

The money in the joint account was kept in the Hongkong and Shanghai Banking Corporation so that it can earn interest until the arbitration between the plaintiff and the 2nd defendant is settled and is a term of a consent judgment in favour of the plaintiff. It was kept in the bank purely as security to ensure that any arbitration award in favour of the 2nd defendant would be settled. As the money in the joint account, as agreed by the parties, is purely as a security to ensure the payment of money that may be awarded to the 2nd defendant by the arbitrator, in my view, for all intents and purposes it is the plaintiff's money as it forms part of the consent judgment in favour of the plaintiff. Whatever interest that the arbitrator may order in favour of the 2nd defendant will be deducted from this joint account accordingly. I therefore do not see how the 2nd defendant can now claim the interest on the joint account when such money rightfully belongs to the plaintiff. In the circumstances such claim fails.

(d) *Interest on the award*

The award was received by the 2nd defendant on 28 October 1988 (see Exhibit 'BL4'). According to para. 1 of the award the plaintiff was ordered to pay interest at 8% per annum if it failed to pay the sum of RM390,117.30 awarded in favour of the 2nd defendant within 21 days of the receipt of the award until the actual date of the receipt of the payment by the 2nd defendant as claimant. The 2nd defendant claims interest of RM139,475.77 under this head to be deducted from the joint account. The issue is - has the plaintiff failed to make the payment as ordered by the arbitrator? If it is so, then the 2nd defendant is entitled to claim the said interest sum. The date of the receipt of the award was 28 October 1988 and the payment will have to be made by 18 November 1988. From the affidavit of J.C. Fong and the letters annexed thereto (see encl. 62) it is clear to my mind that the plaintiff's Counsel took the necessary steps within the time prescribed by the arbitrator to effect payment by getting the consent of Counsel for the 2nd defendant to withdraw the sum held in the joint account. It was made clear to the 2nd defendant's Counsel that if he is not agreeable to the withdrawal of the said money for payment then no interest shall be payable after the 21 days' grace for payment. The 2nd defendant's Counsel instead of agreeing to the withdrawal

of the money intimated that the 2nd defendant did not wish to receive the benefits under the award and was contemplating an appeal against the award (see Exhibit 'D' to encl. 62). In spite of the 2nd defendant failing in its appeal to the High Court the 2nd defendant did not wish to take the money awarded to it by the arbitrator but instead wanted to try and have fresh arbitration proceedings before the same arbitrator on its claims for costs. In any event as the money in the joint account is held under the joint names of J.C. Fong and Benedict Lim (Counsel for the 2nd defendant) it is obvious that by the 2nd defendant's Counsel withholding consent it is impossible for the money to be taken out for payment to the 2nd defendant. Left with no choice, it is only right and proper for the plaintiff to file the present summons-in-chambers for an order of the Court for payment as by para. 7 of the consent Court order, a party is at liberty to apply. Therefore the claim of the Counsel for the 2nd defendant that no money was ever tendered and the authorities relied on by him is totally without merits. In the circumstances I am of the view that it is deemed that the 2nd defendant has forfeited or waived its rights to the interest claimed by it. In any event the plaintiff is not in breach of the order made under the award and the question of the payment of interest does not arise. Therefore it is not entitled to the claim of interest of RM139,475.77.

(e) *2nd defendant's alleged legal fees*

In my opinion the 2nd defendant is only entitled to claim the alleged legal fees if the arbitrator were to order costs to be paid on solicitor client basis which in this case he did not so order. In any event there is no evidence to show that there is a provision in the arbitration agreement that costs should be on solicitor client basis. Therefore the question of deducting this amount from the joint account does not arise and this claim fails.

(f) *Security for costs*

I agree with the submission of Mr. J.C. Fong that there is nothing in the Arbitration Act 1952 which allows a Court of law to order security for costs of arbitration proceedings which had been concluded but the costs of which remains to be taxed by the Registrar pursuant to O. 59 r. 12(b) of RHC. It is also true that under s. 351 of the Companies Act 1965 the Court can only order a plaintiff (and not a defendant) in legal proceedings (including arbitration proceedings) to furnish security for costs. However it is to be noted that we are here not dealing with security for costs in terms of the provisions of law but it is by way of one of the terms of the consent judgment in this suit. The term is that both parties agreed that a certain sum of the consent judgment be set aside to provide for "security" in the event the 2nd defendant is successful in the pending arbitration proceedings. Though the arbitration proceedings are deemed completed there is yet the claim of costs of the arbitration proceedings to be taxed by the Registrar. The costs, in my view, should be within the terms of the settlement of the consent judgment in this suit, that is, to provide 'security' to meet the arbitration award. It is only then proper that a certain sum be set aside to cover for the costs yet to be taxed by the Registrar and the question is how much of the fund should be set aside? Bearing in mind that the 2nd defendant is owing costs (yet to be taxed) to the plaintiff in Originating Motion No. KG19 of 1988 (see Exhibit 'G' to encl. 58), I consider that a sum of RM100,000 would be an appropriate sum that should be kept aside out of the sum of RM1,026,887.30 (including whatever interest accrued thereon) in the joint account. I therefore order that a sum of RM100,000 be retained in the joint account presently held with the Hongkong and Shanghai Banking Corporation until the costs are taxed by the Registrar.

For the reasons set out by me I allow the application of the plaintiff in terms of its summons in chambers filed therein with costs except that a sum of RM100,000 be retained as ordered by me for the purpose of "security" for the payment of the costs yet to be taxed by the Registrar.

Also found at [1991] 2 CLJ 1554